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IN THE

Supreme Court of the United States

_____TERM 1968

NO. 1238

WILLETT WILSON, *Appellant*

v.

CITY OF PORT LAVACA, TEXAS, AND K. A. WALLACE and HIS SUCCESSORS IN HIS CAPACITY AS MAYOR OF SAID CITY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the United States District Court for the Southern District of Texas, entered on January 23, 1968, dismissing a complaint seeking injunctive and declaratory relief from a three-judge court.

OPINION BELOW

The opinion of the District Court for the Southern District of Texas, Victoria Division, is not yet reported.

A copy of the opinion and judgment is attached hereto as Appendix "B".

JURISDICTION

Appellant brought this suit under *28 U.S.C. Sections 2281 and 1331*, seeking a declaratory judgment that a portion of *Texas Statute, Article 342-709* is unconstitutional, being violative of *Amendment XIV, Section 1 of the United States Constitution*, and asking that the Appellees, the CITY OF PORT LAVACA and its MAYOR, be enjoined from invoking the operation thereof, to prevent Appellant from securing evidence of taxable bank and savings and loan deposits to show their omission from the City's tax rolls, thereby causing unequal taxation. An injunction was also sought to restrain the City from enforcing its tax lien on Appellant's property until a determination may be had on the merits of this cause. The judgment of the District Court was entered on January 23, 1968, and notice of appeal was filed in that court on March 7, 1968. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by *Title 28, United States Code, Sections 2101(b), 1253 and 2201.*

QUESTIONS PRESENTED

A. Whether a portion of *Texas Statute, Article 342-709* is in violation of *Amendment XIV of the United States Constitution*, in that it denies Appellant evidence, from the only available source, the local banks and savings and loan institutions, of large amounts of unassessed taxable deposits needed to show unequal and unfair taxation as a defense to the City's tax suit.

B. Whether Appellant is entitled here to the equitable relief sought, in his complaint, his state court remedies having proven inadequate.

STATUTES INVOLVED

Texas Revised Civil Statutes, Articles 342-709, 7145, 7147 and 7149; and *Amendment XIV, Section 1, United States Constitution;* and *Article VIII, Section 1, Texas Constitution.*

STATEMENT

Appellant is the owner of real property in the City of Port Lavaca, Texas, and has been in controversy with the City over his ad valorem taxes. As that dispute is vitally related to the issues presented here, at least some of the history thereof must be examined.

Appellant instituted suit in the District Court of Calhoun County, Texas, attacking his assessment and making the contention so often pressed in Texas that personal property generally is not assessed. He sought to make proof that the provisions of the Texas Constitution and statutes which provide for equal taxation had been violated by reason of the omission from the tax rolls of deposits in the various banks and savings and loan associations in the city. See, *Art. VIII, Sec. 1, Constitution of Texas; Tex. Rev. Civ. Stat., art. 7145 (1925).* The argument is, of course, that inclusion of these deposits on the tax rolls would have substantially reduced the taxes imposed on his real estate.

To make his proof, Appellant sought to take the deposition of certain banking officials to secure a list of the

depositors and the amount of each deposit to show that they were not assessed on the tax rolls. He was not permitted to pursue this course, however, by reason of the terms of *Article 342-709 of the Texas Revised Civil Statutes,* which provide:

> ". . . neither shall any bank be required to disclose the amount deposited by any depositor to third parties except where (i) the depositor or owner of such deposit is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposit of such depositor or owner shall be subject to disclosure or (ii) the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction . . ."

Having lost his case in the trial court, an appeal was taken to the Court of Civil Appeals where he was also unsuccessful. *Wilson v. City of Port Lavaca,* 407 S.W.2d 325 (Tex. Civ. App. 1966). The Texas Supreme Court denied writ of error; and no application for certiorari was made to the United States Supreme Court.

Appellant filed a complaint in the United States District Court seeking declaratory and injunctive relief from a three-judge court, by restraining the operation of a portion of *Texas Statute, Article 342-709,* on the ground of its unconstitutionality. It is contended that it is violative of *Amendment XIV of the United States Constitution,* in that it permits banking institutions to refuse to furnish Appellant evidence of individual deposits needed to be able to show their omission from the tax rolls, causing unequal taxation of Appellant's property, which would be a defense to the City's tax suit. (See Appendix "B" for copy of opinion of District Court.)

THE QUESTIONS ARE SUBSTANTIAL

There is no source, other than the banking and savings and loan institutions, where this information of individual deposits can be completely and accurately secured, and Circuit Judge John R. Brown in *City of Orange v. Levingston Shipbuilding Co.*, 258 Fed.2d 240, 246, 247, says:

> ". . . it is essential to prove how much of these deposits represented property subject to tax by the City of Orange. From the reported total would have to be excluded all balances of federal, state, county, municipal, school, or other governmental entities, governmental administrative agencies and corporations, deposits of exempt charities such as schools, churches, hospitals, community chests, and the like, as well as deposits of a kind which, under Texas law, would be taxable only at the residence of the owner, not the situs of the deposits."

If a person wants to escape ad valorem taxation of his money, all he has to do under *Article 342-709* is deposit it in a bank or savings and loan institution and not render it for taxation. He has no worry for the institution does not have to tell anyone, even the tax assessor, who their depositors are, or how much any depositor has in the institution, so whether it is a few hundred or several million dollars it escapes taxation. Since all deposits are made taxable by *Texas Statutes, Articles 7145, 7147 and 7149*, except those exempted by statute, there can be no equal taxation under *Article VIII, Section 1 of the Texas Constitution*, unless the taxable deposits in the institutions can be determined and taxed. *Texas Statute, Article 342-709*, prevents this, and by so doing, violates *Amendment XIV, Section 1 of the United States Constitution* because it denies Appellant and all other taxpayers due process of

law and the equal protection of the laws. There is no way for Appellant to defend against tax suits for unequal taxes, caused by large amounts of taxable deposits being left off the tax rolls and not taxed except by determining and showing these amounts, and he has been deprived of this defense to the City's tax suit by *Texas Statute, Article 342-709*. Justice Calvert of the Texas Supreme Court says this deprivation makes the statute unconstitutional. In *Whelan v. State*, 282 S.W.2d 378, 383, Justice Calvert says:

> "[12, 13] Article 7329 limits the defenses which may be interposed to suits for delinquent taxes. Subdivision 3 of that article reads as follows: 'That the taxes sued for are in excess of the limit allowed by law, but this defense shall apply only to such excess.' The language of subdivision 3 cannot be construed to mean that a taxpayer may defend against a suit for taxes only when his property is assessed at more than its fair market value or when the rate levied is in excess of that allowed by law. To so hold would require that the statute be held unconstitutional for it would operate to deny to the taxpayer his constitutional right to be taxed on an equal and uniform basis with others. The legislature has no power to sanction discrimination between taxpayers by taking away defenses.

This tax shelter of bank and savings and loan deposits under *Texas Statute, Article 342-709*, is a continuing violation of *Article VIII, Section 1 of the Texas Constitution* and of *Amendment XIV, Section 1 of the United States Constitution* since it permits a taxpayer whose assets are money on deposit to escape all ad valorem taxation because they cannot be determined, while taxpayers whose

assets are real property are required to carry the tax burden, because their property cannot be hidden. We believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

Amendment XIV — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sections 2-5 omitted.

Article VIII, Section 1. Equality and uniformity; tax in proportion to value; poll tax; occupation taxes; income tax; exemption of household furniture

Section 1. Taxation shall be equal and uniform. All property in this State, whether owned by natural persons or corporations, other than municipal, shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. It may also impose occupation taxes, both upon natural persons and upon corporations, other than municipal, doing any business in this State. It may also tax incomes of both natural persons and

corporations other than municipal, except that persons engaged in mechanical and agricultural pursuits shall never be required to pay an occupation tax; Provided, that two hundred and fifty dollars worth of household and kitchen furniture, belonging to each family in this State shall be exempt from taxation, and provided further that the occupation tax levied by any county, city or town for any year on persons or corporations pursuing any profession or business, shall not exceed one half of the tax levied by the State for the same period on such profession or business.

TITLE 28 USCA

Section 1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 928.

Section 1331. Federal questions; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Paragraph (b) omitted.

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

Paragraph (a) omitted.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceedings, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Paragraphs (c), (d), (e), and (f) omitted.

Section 2281. Injunction against enforcement of State statute, three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court of judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

Section 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not

further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. July 7, 1958, Pub. L. 85-508, § 12(p), 72 Stat. 349.

VERNON'S TEXAS CIVIL STATUTES

Article 342-709. Adverse claims to deposits; disclosure as to amount deposited

No bank shall be required to recognize the claim of any third party to any deposit, or withhold payment of any deposit to the depositor or to his order, unless and until the bank is served with citation or other appropriate process issuing out of a court of competent jurisdiction in connection with a suit instituted by such third party for the purpose of recovering or establishing an interest in such deposit; neither shall any bank be required to disclose the amount deposited by any depositor to third parties except where (i) the depositor or owner of such deposit is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposit of such depositor or owner shall be subject to disclosure or (ii) the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction or (iii) in response to a subpoena issued by a legislative investigating committee of the Legislature of Texas, or (iv) in response to a request for examination of its records by the Attorney General of Texas pursuant to Article 1302-5. 01 et seq. of the Texas Miscellaneous Corporation Laws Act. As amended Acts 1963, 58th Leg., p. 1135, ch. 440, § 1.

Article 7145. All property taxed

All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed, Acts 1876, p. 275; G. L. vol. 8, p. 1111.

Article 7147. "Personal property"

Personal property, for the purpose of taxation, shall be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of this State, whether the same be in or out of the State; . . .

Article 7149. Definition of terms

The term, "money", or "moneys", wherever used in this title shall, besides money or moneys, include every deposit which any person owning the same or holding in trust and residing in this State, is entitled to withdraw in money on demand. . . .

APPENDIX "B"

IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

WILLETT WILSON, *Plaintiff,*

v.

CITY OF PORT LAVACA, TEXAS, AND K. A. WALLACE ND HIS SUCCESSORS IN HIS CAPACITY AS MAYOR OF SAID CITY, *Defendants.*

CIVIL ACTION NO. 67-V-7

Willett Wilson, Houston, Texas, attorney for Plaintiff.
Cullen, Mallette, Maddin, Edward & Williams (H. F. Maddin, Esq.), Victoria, Texas, attorneys for Defendants.

January 23, 1968

Before BROWN, Circuit Judge, and CONNALLY and SINGLETON, District Judges.

CONNALLY, District Judge.

Plaintiff seeks injunctive and declaratory relief from this three-judge court. He is the owner of real property in the City of Port Lavaca, Texas, and has been in controversy with the City over his ad valorem taxes. As

that dispute is vitally related to the issues presented here, at least some of the history thereof must be examined.

Plaintiff instituted suit in the District Court of Calhoun County, Texas, attacking his assessment and making the contention so often pressed in Texas that personal property generally is not assessed. He sought to make proof that the provisions of the Texas Constitution and statutes which provide for equal taxation had been violated by reason of the omission from the tax rolls of deposits in the various banks and savings and loan associations in the city. See, Art. VIII, Sec. 1, Constitution of Texas; Tex. Rev. Civ. Stat., art. 7145 (1925). The argument is, of course, that inclusion of these deposits on the tax rolls would have substantially reduced the taxes imposed on his real estate.

To make his proof, plaintiff sought to take the deposition of certain banking officials to secure a list of the depositors and the amount of each deposit. He was not permitted to pursue this course, however, by reason of the term of Article 342-709 of the Texas Revised Civil Statutes, which provide:

> ". . . neither shall any bank be required to disclose the amount deposited by any depositor to third parties except where (i) the depositor or owner of such deposit is a proper or necessary party to a proceeding in a court of competent jurisdiction in which event the records pertaining to the deposit of such depositor or owner shall be subject to disclosure or (ii) the bank itself is a proper or necessary party to a proceeding in a court of competent jurisdiction. . . ."

Having lost his case in the trial court, an appeal was taken to the Court of Civil Appeals where he was also unsuccessful. *Wilson v. City of Port Lavaca,* 407 S.W.2d 325 (Tex. Civ. App. 1966). The Texas Supreme Court denied writ of error; and no application for certiorari was made to the United States Supreme Court.

The plaintiff here seeks a declaratory judgment that Article 342-709 is unconstitutional as violation of the Fourteenth Amendment, and asks that the City be enjoined from invoking the provisions thereof. An injunction is also sought to restrain the City from enforcing its tax lien upon plaintiff's property "until a determination may be had on the merits of this cause." The complaint alleges, at least formally, federal question jurisdiction under Title 28 U.S.C. § 1331.

To invoke the provisions of Section 2281 of Title 28 U.S.C., requiring certain cases to be heard by a three-judge court, it must appear that the action is (1) for an injunction, (2) to restrain the enforcement, operation or execution of a state statute, (3) by restraining the action of an officer of the state in the enforcement or execution of such statute, (4) on the ground that the statute is unconstitutional. The injunctive relief which the plaintiff seeks is to restrain the defendant City and its Mayor from invoking the provisions of Article 342-709. However, neither of these parties enforces or executes such statute. Indeed, there is no party defendant who does. Clearly, plaintiff's claim is without the scope of the three-judge act.

The trouble with plaintiff's other request for injunctive relief—that the City be restrained from enforcing its tax lien—is that no attack is made upon the constitutionality

of the state statute authorizing the enforcement of the liens. The only statute attacked, Article 342-709, relates solely to evidentiary matters and has nothing to do with the collection of ad valorem taxes. The claim is not, therefore, one which must be heard by a three-judge court.

Furthermore, whether this be a case for a three-judge court or not, the equitable relief which plaintiff seeks is not available to him. He has an adequate remedy at law in state court to prevent the collection of taxes not properly assessed; and if Article 342-709 proves to be an obstacle in the assertion of that remedy, its constitutionality can there be attacked without the necessity of an injunction.[1] *City of Houston v. Standard-Triumph Motor Co.*, 347 F.2d 194 (5th Cir. 1965). The fact that plaintiff chose not to raise the constitutional issue in his prior state court litigation improves his claim in equity not at all.[2]

Plaintiff's final claim is for a declaratory judgment. Certainly, there is nothing which would require a three-judge court to hear such a claim. Title 28 U.S.C. § 2281. Moreover, there are other considerations which would militate against entertaining the claim at all; and in this

1. While this general equitable principle is conclusive of plaintiff's right to injunctive relief, it would seem that Section 1341 of Title 28 U.S.C. provides an additional basis for withholding relief, at least with respect to the action to restrain the enforcement of the tax liens. "The district court shall not enjoin, suspend or restrain the assessment, levy or collection of any taxes under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

2. It is interesting to note that plaintiff alleges the specific dollar amount of $3,354.56 as excess taxes paid for the two years of 1963 and 1964, "which is the amount of irreparable injury which plaintiff will sustain." Hence, by his own allegation, the "irreparable injury" may be reduced to a dollar and cents figure.

the Court is vested with considerable discretion. *Zemel v. Rusk*, 381 U.S. 1 (1965); *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237 (1952); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942). In exercising its discretion, the Court is permitted to consider the probable effect the granting of relief would have in settling the controversy between the parties. *Samuel Goldwyn, Inc. v. United Artists Corp.*, 113 F.2d 703 (3rd Cir. 1940); *Aetna Casualty Co. v. Quarles*, 92 F.2d 321 (4th Cir. 1937).

If the statute here under attack is declared unconstitutional, as plaintiff would have it, he still would not be assured of success in his dispute with the taxing authorities. Article 342-709 does no more than deny him one means of making certain proof; and if by our action that means is made available to him, he will have overcome only one of many "difficulties to be encountered in making the necessary proof . . . for relief." *Wilson v. City of Port Lavaca*, 407 S.W.2d 325, 330. To grant declaratory relief in these circumstances would be highly inappropriate.

Therefore, it is ORDERED, ADJUDGED and DECREED that the action be, and the same is hereby dismissed. Judge Connally, in whose Court the case was originally filed, adopts the action of this Court as his own.

This is a final judgment.

The clerk is directed to file this Memorandum and Order and to furnish copies hereof to counsel of record.

Done at Houston, Texas, this 23rd day of Jan., 1968.

JOHN R. BROWN
Circuit Judge

BEN C. CONNALLY
District Judge

JOHN V. SINGLETON
District Judge

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

WILSON *v.* CITY OF PORT LAVACA, TEXAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 1238. Decided May 20, 1968.

PER CURIAM.

A three-judge federal court, convened pursuant to 28 U. S. C. § 2281, determined that plaintiff's claim was not "one which must be heard by a three-judge court." —— F. Supp. ——, ——. It also ruled that the relief sought by plaintiff was not warranted. The district judge in whose court the case was originally filed adopted the action of the court as his own. The resulting situation is similar, we think, to that which results when a single judge declines to convene a three-judge court and denies relief: an appeal lies to the appropriate United States Court of Appeals, and not to this Court. *Schackman* v. *Arnebergh,* 387 U. S. 427. It does not appear from the record that a protective appeal was lodged in the Court of Appeals, and the time to do so may have expired. Therefore, we vacate the judgment below and remand the case to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals. *Utility Comm'n* v. *Pennsylvania R. Co.,* 382 U. S. 281, 282.

It is so ordered.